IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 149 of 1991

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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VIRAM SUKA & 1 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
HL MR VIJAY H PATEL for M/s. HL PATEL ADVOCATES for Appellants
MS DS PANDIT, ADDL. PUBLIC PROSECUTOR for Respondnt

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 28/09/2007

ORAL JUDGMENT

1. This appeal is filed under Section 374 of the Code of Criminal Procedure, challenging the legality and validity of the order of conviction

and sentence passed by the learned Additional Sessions Judge, Porbandar in Sessions Case No. 23/90. The appellant nos. 1 and 2 are original accused no. 1 and 2 respectively.

2. The appellants were tried for the offences punishable under Section 302 read with Section 34 of I.P.C. After the conclusion of the trial, the learned trial Judge held accused no.1 guilty of charge of offence punishable under section 325 of IPC and sentenced him to undergo 7 years' rigorous imprisonment and to pay fine of Rs. 1000/- and, in default of payment of fine, the learned trial Judge has imposed punishment of rigorous imprisonment for 6 months. Accused no. 2 was sentenced to undergo rigorous imprisonment for 9 months and to pay fine of Rs. 500/- and in default thereof, punishment of rigorous imprisonment for three months is imposed.

3. Mr. Vijay Patel, learned counsel appearing for the appellants on behalf of M/s. H.L. Patel Advocates, has taken me through the various grounds under which legality and validity of the judgment and order impugned herein has been

assailed. Mr. Patel has also taken me through the judgment as well as documentary evidence led during the course of the trial. According to Mr. Patel, the findings recorded by the learned trial Judge are based on erroneous appreciation of evidence. It is submitted that the persons who have been examined as eye witnesses ought not to have been believed as their presence near the spot of the incident was doubtful. It is submitted that the learned trial Judge has not considered the material statements made by the witnesses and the conflict interse in their evidence. That one significant aspect has been ignored that of change of place of incident actually occurred. It was submitted that point of delay in lodging the FIR adversely affects the case of the prosecution; that the reliability of the witnesses is also one of the points urged before the Court. That the learned trial Judge ought to have observed that two important witnesses, namely Kaliben and Dhaniben, that is, daughter of the deceased and widow of the deceased may

not be present near the spot of the incident. That material panch witnesses have not supported the case of the prosecution and important witnesses who were genuinely present at the time of the incident or immediately thereafter, have not been examined. It was submitted that non-examination of important witness has resulted into serious miscarriage of justice and this Court should hold that the prosecution has acted in unfair manner in conducting the trial and selecting the witnesses for examination. It is also argued that on a close scrutiny of the evidence, it appears that medical evidence does not support the version of so-called eye witnesses and that two important witnesses examined by the prosecution, namely, Devshi and his mother Puri have not stated specifically that they have or any one of them has actually witnessed the incident, that is, the act of assault. That their evidence can be said to be hazy. That the accused appear to have been the persons selected by the police to resolve the crime at the instance of the son of

the deceased. However, backbone of the argument of Mr. Patel is that a very important witness, that is, injured himself could not be examined who was best available person for prosecution and with the investigating agency. But for the reasons best known to the prosecution, no evidence which could be said to be legal in nature, has been brought on the record. That the police did not record the complaint of the injured himself and there is no evidence to show that he was unconscious throughout and in the early hours, he was not able to narrate the incident. That considering the physical condition of the victim, when the hospital authorities of Porbandar decided to shift him to better and bigger hospital at Jamnagar known as Guru Govindsinh Hospital, Porbandar police could have arranged for recording of his dying declaration. Even the doctor could have recorded his statement in the form of dying declaration. Even the police personnel on duty in Guru Govindsinh Hospital could have recorded his statement in the form of dying declaration.

It is submitted by Mr. Patel that the hospital authorities at Jamnagar could have intimated either local police or Porbandar police to see that the dying declaration of the injured is recorded. On the contrary, it has come on record that as the physical condition of the injury deteriorated during the treatment, family members decided to take the victim to his residence in his native village, where the incident had occurred. After about 20 days, the victim succumbed to the injuries. It is very likely that he might have succumbed to the injuries, but it is the duty of the prosecution to establish that fact. It is submitted that the relatives including son of the complainant who was Sarpanch of the village Panchayat, who is the responsible person, had not even cared to inform the police about the death of his father. Therefore, the investigating officer could not arrange for postmortem of the deceased. It is submitted that as it was not possible for the prosecution to establish the link between the injuries

sustained by the deceased and the death, the accused could not have been linked with the crime punishable under Section 302 of I.P.C. It is submitted that the implication of the accused no. 2 appears to be a planned decision of the complainant. That the so-called animosity was existing between the deceased and his family and the accused no. 1. Accused no. 2 is undisputedly son in law of PW Dhani, daughter of deceased. It is the say of the prosecution that as the daughter of deceased was not permitted to go to her matrimonial home, the appellant no.1, original accused assaulted the deceased on the date of the incident.According to Mr. Patel, evidence led by the prosecution is inadequate to link the accused with the crime. The accused persons were at least entitled to get benefit of doubt in absence of cogent and convincing evidence linking the accused with the crime.

4. Ms.D.S.Pandit, learned Additional Public Prosecutor submitted that the finding of guilt recorded by the learned trial Judge is based on sound reasons; that there was no reason for the

trial court to disbelieve the say of the complainant who unfolded the story before the police for the first time when the deceased, that is, father of the complainant was admitted in Bhavsinhji Hospital, Probandar. She submitted that two important witnesses, namely, Devshi and Puri, both are relatives of Kali and the deceased and therefore, they were supposed to know and identify the accused. It was submitted that Devshi has categorically stated that he had seen the accused persons at the spot of the incident. That he had also seen the deceased falling down on the earth when the deceased was in the field of Devshi. It is not disputed that Devshi and his family are residing in the house erected in the agricultural field where the incident had occurred. Sum and substance of the evidence of Puri also corroborates the version of Devshi and she has also stated that on hearing the shouts, she had come out of the house and had seen the accused persons. It is submitted that the learned trial Judge has accepted the

evidence of these two witnesses keeping in mind the evidence of animosity that was prevailing between the accused no.1 and the deceased. Ms. Pandit has fairly accepted that for want of postmortem note and even the inquest panchnama, it was not legally possible for the learned trial court to link the accused persons with the crime under Section 302 and the Investigation Officer could have arranged for recording of the dying declaration of the deceased when his health deteriorated in Irwin Hospital at Jamnagar. However, when the eye witnesses were available with the prosecution ,then, it was the duty of the learned trial court to evaluate the evidence and decide whether any of the accused could be linked with the crime which can be said to be minor offence than the offence punishable under Section 302 of I.P.C. It was submitted that therefore, keeping in mind the nature of the weapon used while assaulting the deceased and three injuries that were noticed by the doctor, the accused persons have been guilty of the charge of offence punishable under Section

325 read with Section 114 of IPC. It was submitted that as the original accused no.1 was holding axe, he has been safely dealt with and as the other co-accused was holding stick at the time of the incident, he has been imposed much lesser punishment than the accused no.1. It was submitted that the learned trial Judge has assigned good reasons for accepting the say of the witnesses Devshi, Puri and Kali. It is also submitted that this is not a case of delayed FIR, because, the Court should see the distance between Bhavsinhji Hospital, Porbandar and place of incident where it had occurred. It has been the experience of our society that remote villages have very limited transportation facilities and therefore, the deceased was initially brought on the road which has been referred to as Patiya of village Nagajan and from there, witnesses as well as the deceased had boarded a bus for Porbandar. It is submitted that both the hands of the deceased were fractured, injury on the chest was also noticed and the ribs were also found fractured. That one

injury was also found on the head of the deceased. It was submitted that as the legs were not affected adversely with the injuries, it was possible for the deceased to move and therefore, he was able reach the hospital in a reasonable period of time. In this fact situation, giving of a complaint at about 7.00 P.M. Would not make FIR either belated and/or manipulated FIR. According to her, the conviction recorded by the trial court is just and proper.

5. On a query raised by the Court of some conflicts in the evidence of the eye witnesses examined by the prosecution, Ms. Pandit has fairly accepted that perhaps Kali and Dhani may not have actually witnessed the incident, otherwise, there would not have been any contradiction qua the actual place of assault. In the FIR, place of assault is shown to be field of the deceased whereas as per the eye witnesses Devshi and his mother Puri, the deceased was assaulted when he was in the field of Devshi. That the deceased was assaulted when he was in the field of

Devshi. Ms. Pandit has also accepted that the Investigating Officer has admitted in his evidence that place of incident shown in the FIR was not found to be true and the Investigating Officer was able to notice that the deceased must have been assaulted when he was in the field of Devshi where the witness Devshi was present.

6. I have considered the rival contentions and on careful cross-examination of the witness, it emerges that the learned trial Judge, while linking the accused with the crime has ignored certain material aspects. It has emerged that this is a case of delayed and/or manipulated FIR and therefore, it is a settled legal position that advantage of this situation should always go to the accused. The complainant is the son of the deceased. Even as per the prosecution case, the complainant was not an eye witness of the incident. He had joined his father and other witnesses who were accompanying the deceased when they were at Nagajan Patiya. He was Sarpanch of Village Panchayat, meaning thereby,

he was not a rustic villager. He claims that he was a party in getting his father admitted in the hospital. Even then, the case papers produced show name of somebody else, that is, Bhikhu Rama. The complainant himself has admitted during his cross-examination that the entire story was told by his deceased father when he met him for the first time near Nagajan Patiya. It may be that his father may have talked with him when they were proceedings towards Porbandar. Therefore, it is inferable that the complainant must be knowing about the entire incident including the name of the actual assailant when they had reached Bhavsinhji Hospital, Porbandar. This witness has admitted that police had been to Bhavsinhji Hospital once, but it is not the say of the complainant that at that very point of time, he has given his complaint or his say was reduced in writing. On the contrary, he has admitted that during the first visit of Police Head Constable, no complaint was given and when that very Head Constable came for the second time, he gave a

complaint. Of course, he has not admitted that it was 7.00 p.m. or 7.30 p.m. He has simply stated that he cannot say that his complaint was recorded at about 7.00 p.m. To 7.30 p.m. Therefore, the complaint given by the complainant also does not show correct place of the incident. Crucial question which was required to be addressed by the learned trial Judge was that for what reason, the complainant described the incorrect place. Persons who had brought the deceased in the hospital were present at the place of the incident in the village and the complainant had joined them subsequently. At least, they could have told about the actual place of the incident to the complainant. This shows that deliberate lie was told to the police who had come to record the FIR. It appears that initially the complainant may have apprehended that Devshi or Puri or the persons who were also working in the nearby area may not support his say that he really intends to put before the police and therefore, he had perhaps decided to shift the place of the

incident to his own field and that would make it easier for him to brand Kali and Dhani as genuine witnesses present at the spot of the incident.

7. No further statement appears to have been recorded by the Investigating Officer when he himself found that the place of the incident shown in the complaint is different than the actual place recorded by him during the course of the investigation otherwise, the Investigating Officer could have said that he has recorded further statement and had sought clarification from the complainant that which circumstances tempted him to mention incorrect place in the FIR. Thus, it was not possible for the Court to say legally that Kali or Dhani were genuine eye witnesses to the incident. Kali could have been examined to prove the motive but the Investigating Officer, sailing with the complainant, posed Kali as eye witness to the incident. If Kali or Dhani or any one of them are accepted to be eye witnesses, then, version of Devshi and Puri would become doubtful.

8. It is settled legal position that when witnesses attempt to confuse the Court by leading conflicting and contradictory evidence, then the Court has to find out the truth. For the sake of argument, even if it is accepted that it is possible for this Court to separate the witnesses by ignoring the evidence of Kali and Dhani as eye witnesses, is it possible for the Court to link the accused with the crime by accepting the version of Devshi or Puri or both of them. It appears that Devshi and Puri also have not seen the incident otherwise, Devshi could have stated in his deposition that on his shouts, his mother Puri also had come out of the house and both of them had seen the accused persons at the time when they were assaulting the deceased.

9. This Court and the Apex Court have observed in number of cases that when evidence of any teen-ager requires to be scanned, then, the same should be scanned closely, because, such teen-agers have tendency to lean towards the party for whom they are called as witnesses for

recording evidence. Undisputely, he is close relative of the deceased. Some blood was found on the earth as well as one stone that was lying in the field of Devshi. Therefore, at the most, it was possible for the Court to reach to a conclusion that the deceased must have been assaulted when he was in the field of Devshi. Devshi is also not sure that why the deceased had entered in his field. According to this witness, it was his inference or surmise that perhaps his uncle may have entered his field to collect the water pump laid down for the purpose of irrigation. However, it is to be seen that there is no reference to the existence of water pump or water pipeline in the panchnama of the scene of offence nor at the place where blood stains were found. It was not possible for any witness to narrate the detailed conversation that may have taken place between the assailants and the deceased looking to the distance between the witnesses and the deceased. Devshi himself has admitted that when he saw the deceased for the first time, he had

already fallen down and before he could reach near the deceased, the accused persons had escaped. He has not stated in his examination in chief that when he saw the accused persons for the first time what was the distance between him and the accused persons when they were assaulting the deceased or when they escaped from the spot. Of course, it has come in the evidence in the cross-examination of Devshi that he was at a distance of 100 feet but it is not clear that whether any obstruction was there in between him and the accused. He has used the words “THODE DOOR” in Gujarati vernacular, meaning thereby, he was at some distance. This version can be said to be vague in nature, because, it has come in the evidence that at that time, surrounding fields were having crop of sugarcane and height of the sugarcane crop is also narrated by the witness. Therefore, for the sake of argument even if it is accepted that Devshi was present in his field, then also, he being a partisan witness and some disharmony in the evidence of these two witnesses Devshi and

Puri makes version of this witness weak. It would be risky for this Court to say that the accused can be linked with the crime on the strength of the evidence of Devshi or Puri or both. Evidence should be cogent and of convincing nature. Statement of Devshi was recorded by the Investigating Officer on 31st May, that is, on the next day. If Devshi was genuine eye witness or his mother Puri had really rushed to the spot of incident immediately after the escape of the accused persons, then, their names, at least, could have been reflected in the FIR as eye witnesses. Non-mention of their names in the FIR as eye witnesses adds to the infirmities that have emerged from their evidence. In the complaint, Dheliben Savdas, Malde Kara, Chhagan Kara and Bhima Giga are shown to be eye witnesses or persons who were present in the field when the deceased was assaulted. It is claimed by the complainant that these persons are witnesses to the incident and they have witnessed the incident. However, none of these witnesses

except Dheliben Savdas, have been examined by the prosecution.

10. One another important aspect is that the Court has reason to believe that Kali or Dhani or both of them must have accompanied the deceased when he was taken to Porbandar Hospital for treatment. If they were genuine eye witnesses, then, their names could have been reflected in the FIR as eye witnesses to the incident. They themselves must have told the complainant that both of them had witnessed the incident. Therefore, the version of the complainant in the FIR contradicts the case of the prosecution placed before the Court. It is settled legal position that FIR can be used either to contradict or corroborate the complaint and the case of the prosecution. Thus, what is the substrata of the story of the prosecution ultimately has to be decided on the strength of the facts given in the complaint unless it is found that the complaint is totally false complaint. From this criteria also, it is clear that the prosecution has not successfully

proved the substrata of the story beyond doubt. On the contrary, it is possible to observe that witnesses have moulded their story at subsequent stage. It is well settled that any witness, if tries to modulate the story so that his version can fit with the basic story put up by the prosecution, then, it would be risky for the Court to accept the evidence of such evidence. Modulation is possible only when the witness is ready to make material improvements or by making certain omissions that have been made by prosecution witnesses in the present case.

11. It is rightly argued by Mr. Patel that absence of dying declaration would go to the root of the case of the prosecution. First and best piece of evidence available with the prosecution was the deceased and there is no version the deceased before the learned trial Judge. Therefore, the accused could not cross-examine or take test about the genuineness of the story put up by the prosecution by cross-examining the deceased. There is no dying declaration on

record. For the sake of argument, even if it is accepted that the statement recorded by the police, that is, Investigating Officer of the deceased piece of evidence in the nature of dying declaration, even then, it would not be possible for this Court to accept such version as dying declaration, because, the deceased was never found critical because of the injuries sustained by him. With the fracture of both hands with some simple injury on the head, a normal healthy person would not become critical and if prosecution intends to say that the deceased was drawn under the apprehension of death, then, such piece of evidence should be brought on the record but here the situation is contrary. Doctor of Bhavsinhji Hospital who was examined, has described the injuries sustained by the deceased, but has not said that any of these injuries were likely to result into death. On the contrary, his version is that one would not die on account of such injuries. Merely because of complexities in the injuries of fractures on both hands, the deceased might

have been taken to better hospital at Jamnagar and he had left the hospital on deterioration in health. Ultimately, the deceased died after about 20 days. Therefore, when it is not possible for the prosecution to establish that there was a nexus between the death and the injuries sustained by the deceased, any statement made by such injured would not fall in the category of statement under Section 32 of the Indian Evidence Act.

12. True it is that the injuries that were found on the body of the deceased were proved by the prosecution by deposition of the medical officer of Hospital at Porbandar and the certificate produced vide exh. 7 as grievous hurts within the meaning of Section 320 of I.P.C, but the prosecution has failed to establish that the accused or anyone of them were responsible for these injuries by leading cogent and convincing evidence. There is no clear evidence that the deceased had no animosity with anybody. On the contrary, after all, he was father of a village Sarpanch. In such situation, the learned trial

Judge ought to have given benefit of doubt to the accused person. No incise wound that can be caused by axe was found. Therefore, it was possible for the learned trial Judge to observe that the narration of the incident by Devshi or Puri does not get corroboration from the medical evidence. Thus, totality of evidence tends me to arrive at a conclusion that the finding recorded by the learned trial Judge is based mainly on conjectures and surmises and is also consequence of incorrect appreciation of evidence. Some change in place of the incident or non-availability of the postmortem not the points before the trial court but the impact of this situation on the merits of the matter was an issue before the learned trial court which has not been addressed properly and legally by the learned trial Judge and that has resulted into conviction.

13. For the reasons aforesaid, the present appeal requires to and is accordingly allowed. Judgment and order of conviction and sentence rendered in Sessions Case No. 23 of 1990 by the learned

Additional Sessions Judge, Porbandar on 28.2.1991 is hereby quashed and set aside. The appellants-accused are acquitted from the charges levelled against them punishable under Section 325 read with Section 114 of IPC by giving them benefit of doubt as it is risky for this Court to link the accused with the crime only on the ground of motive pleaded by the prosecution and such erroneous finding of guilt cannot sustain in the eyes of law. The appellants-accused are ordered to be set at liberty forthwith, if not required in any other case. As the accused are on bail, the bail bonds executed by the accused shall now stand discharged as the appellants are enjoying bail. Amount of fine, if paid, shall be refunded to them on proper identification. Order and direction accordingly.

[C.K. BUCH, J.]

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